U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 3/8/2001

IN THE MATTER OF:	*	
	*	
Ernest H. Giles, Jr.	*	
Claimant	*	
	*	
v.	*	Case No.: 2000-LHC-1702
	*	
Bath Iron Works Corporation	*	OWCP No.: 1-136204
Employer/Self-Insurer	*	
	*	
and	*	
	*	
Director, Office of Workers' Compensation Programs, United States Department of Labor	*	
Party-in-Interest	*	

APPEARANCES:

James W. Case, Esq.
For the Claimant

Stephen Hessert, Esq.
For the Employer/Self Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33

U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 27, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 8A	Attorney Case's letter filing the	01/23/01
CX 8	October 31, 2000 Deposition Testimony of the Claimant	01/23/01
CX 9	Attorney Case's Fee Petition	01/23/01
EX 25	Attorney Hessert's letter filing the	01/24/01
EX 26	January 12, 2001 Deposition Testimony of Peter J. Haughwout, M.D.	01/24/01
EX 27	Employer's comments on the Fee Petition	01/29/01
EX 28	Employer's brief	01/29/01
CX 10	Attorney Case's response	02/07/01

The record was closed on February 7, 2001 as no further

documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant has suffered an injury in the course and scope of his employment which consists of a 51.70 percent binaural hearing loss.

4. Claimant filed a timely claim for compensation (EX 5) and the Employer filed a timely notice of controversion. (EX 3)

5. The parties attended an informal conference on March 2, 2000.

6. The applicable average weekly wage is $651.18.

7. The Employer has paid neither compensation nor medical benefits.

The unresolved issues in this proceeding are:

1. The extent of Claimant’s current hearing loss.

2. The extent of any pre-employment hearing loss.

3. The applicability of Section 8(f).

For the reasons stated herein, this Court finds that the Employer had timely notice of Claimant’s hearing loss and that Claimant filed a timely claim for compensation. This Court further finds that Claimant presently suffers from a 51.70 percent binaural hearing loss arising out of and in the course of his employment and that the Employer is not only responsible for the benefits awarded herein, but also is entitled to Section 8(f) relief in mitigation of that obligation.

Summary of the Evidence

Ernest H. Giles, Jr., fifty-two (52)years of age, with a GED obtained on May 11, 1990 and an employment history of manual labor, began working on September 13, 1974 as a welder at the Bath, Maine shipyard of the Bath Iron Works Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Kennebec River where the Employer builds, repairs and overhauls vessels. He has worked at the shipyard as a welder, a tinsmith and as a machine operator; he has also worked for a time at one of the Employer's inland facilities and has primarily worked at the Employer's Bath, Maine shipyard. (EX 19) While at the Employer's shipyard, Claimant was exposed to loud noises every day, including but not limited to the loud noises that he generated but also to the loud noises generated by the grinding, chipping and gouging of metal by the trade workers around Claimant. (CX 8 at 3-8)

Claimant left the Employer's shipyard on March 2, 1976, January 21, 1983, May 17, 1983 and May 15, 1987 and went to work elsewhere. He was also transferred to the tin shop on April 6, 1987 and January 1, 1990. (EX 19) While in those jobs, Claimant was still exposed to some occasional noise, but because he now was wearing hearing protection, not to the extent he had experienced at the Employer's shipyard. Claimant is still regularly exposed to the same types of noise. Presently, Claimant continues to be employed at the Employer's shipyard. (CX 8 at 9-46)

Claimant entered the employ of the Employer on at least seven (7) separate occasions, and each time he was given a pre-employment physical examination and a hearing test. Claimant's February 6, 1996 pre-employment hearing test was administered and this test revealed a 40 percent binaural hearing loss. (EX 23 at 66)

On behalf of the Claimant, the November 29, 1999 medical report of Dr. Peter J. Haughwout was introduced. (CX 2) Dr. Haughwout had reviewed an audiogram performed on Claimant at Mid Coast Hospital. This audiogram, which is dated October 6, 1999 (CX 3), revealed a 51.70 percent binaural hearing loss which Dr. Haughwout opined was sensorineural in nature and was consistent, in part, with employment-related noise exposure. Dr. Haughwout based this opinion on the Claimant's history report, the physical examination and his review of Claimant's audiograms

since 1982. (CX 2) Dr. Haughwout reiterated his opinions at his January 12, 2001 deposition. (EX 26)

On the basis of the totality of this closed record[1], this Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with

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[1]As the Employer has accepted liability for any benefits awarded herein as the Responsible Employer, pursuant to the so-called **Cardillo** rule and as the parties deposed Claimant on November 16, 2000 (CX 8), Claimant who was present for his hearing was excused from testifying at the hearing.

the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to

the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his binaural hearing loss, resulted from his exposure to loud noises at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant’s employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim “in the absence of substantial evidence to the contrary.” 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The “ruling out” standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O’Kelley v. Dep’t of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician

expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

I. **Notice and Timeliness of Claim**

Under the 1984 Amendments to the Act, in hearing loss cases the time for filing a notice of injury under Section 12 and a claim for compensation under Section 13 does not begin to run until the employee has received an audiogram and a report indicating that he has suffered a work-related hearing loss. Section 8(c)(13)(D) as amended by P.L. 98-426, enacted September 28, 1984. **Mauk v. Northwest Marine Iron Works**, 25 BRBS 118 (1991); **Fucci v. General Dynamics Corp.**, 23 BRBS 161 (1990); **Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in part, rev'd in part and remanded sub nom. Ingalls Shipbuilding v. Director, OWCP**, 898 F.2d 1088 (5th Cir. 1990), **Rehearing En Banc denied**, 904 F.2d 705 (June 1, 1990); **Machado v. General Dynamics Corp.**, 22 BRBS 176 (1989); **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Macleod v. Bethlehem Steel Corp.**, 20 BRBS 234 (1988). **See also Alabama Dry Dock and Shipbuilding Corporation v. Sowell**, 933 F.2d 1561, 24 BRBS 229 (11th Cir. 1991).

Claimant's hearing acuity was tested at the Mid Coast Hospital on October 6, 1999 and he learned of his hearing impairment on the date of this examination. He received a copy of the audiogram and the audiologist's report on or about November 17, 1999. (CX 2; CX 3 at 27) As noted, Claimant received a copy of the doctor's report on or about November 29,

1999. (CX 2 at 26) The notice and filing periods in this case, thus, began to run on November 29, 1999. Claimant's protective claim for benefits is dated April 4, 1996. (CX 6 at 47) Clearly, the requirements of Section 12 and 13 have been satisfied by Claimant. **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301 (1980); **Fucci, supra**; **Fairley, supra**; **Machado, supra**; **Grace, supra**; **MacLeod, supra**.

II. Nature and Extent of Disability

A. Causal Connection

The Claimant must allege and injury which arose out of an in the course of his employment. **U.S. Industries v. Director, Office of Workers' Compensation Programs**, 455 U.S. 608, 102 S.Ct. 1312 (1982). The term "arose out of" refers to injury causation. (**Id.**) The Claimant must allege that his injury arose in the course of his employment as the Section 20 presumption does not substitute for allegations necessary for Claimant to state a **prima facie** case. (**Id.**)

The medical evidence before this Court clearly establishes that Claimant suffered a hearing loss arising out of and in the course of his work at the Employer's shipyard. Dr. Haughwout, based upon Claimant's personal history and upon a physical examination, and his review of Claimant's audiograms since 1982, opined that Claimant suffered from a sensorineural hearing loss in both ears which was consistent, in part, with noise-induced loss and due to employment-related noise exposure. (CX 2)

The well-reasoned and well-documented report of Dr. Haughwout (EX 26) and the of the audiologists, Cynthia Hyman, M.A., CCC-A (CX 3 at 27), Lisa Klop, M.S., CCC-A (CX 4 at 34, 36, 37), together with Claimant's testimony (CX 8) and the lack of evidence of non-employment related exposure to noise, demonstrate a causal connection between Claimant's hearing impairment and his work at the Employer's shipyard. This Court thus finds that Claimant has satisfied the rule in **U.S. Industries, supra**, and that the Employer/Self-Insurer is responsible for Claimant's work-related hearing loss. **See Fucci v. General Dynamics Corp.**, 23 BRBS 161 (1990); **McShane v. General Dynamics Corp.**, 22 BRBS 427 (1989); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301 (1989).

While the record reflects that Claimant had a significant degree of hearing loss at the time he was hired and re-hired by the Employer on various dates (CX 1), it is well-settled that the Employer takes its workers "as is," with all the human frailties, and the Employer is responsible for the combination or aggravation of such pre-existing disability with a subsequent work-related injury subject, of course, to the limiting provisions of Section 8(f) in appropriate situations. Moreover, while Claimant's hearing loss is due to both employment-related noise exposure and to some non-employment related factors, it is well-settled that the Employer is liable for Claimant's entire binaural hearing loss. **Epps v. Newport News Shipbuilding and Dry Dock Company**, 19 BRBS 1 (1986); **Worthington v. Newport News Shipbuilding and Dry Dock Company**, 18 BRBS 200 (1986). Furthermore, the Board has held that the aggravation rule does not permit a deduction from Employer's liability in hearing loss cases for the effects of presbycusis (**i.e.**, hearing loss due to the aging process). **Ronne v. Jones Oregon Stevedoring Company**, 22 BRBS 344 (1989), **aff'd in pertinent part and rev'd on other grounds sub nom. Port of Portland v. Director, OWCP**, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991).

Thus, the Employer as a self-insurer is responsible for all of Claimant's current hearing loss subject, of course, to Section 8(f) relief if the tri-partite requirements are satisfied.

B. Degree of Hearing Loss

The 1984 amendments provide that an audiogram "shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof. . . "if it was administered by a licensed or certified audiologist or a physician certified in otolaryngology, was provided to the employee at the time it was performed, and if no contrary audiogram made at the same time (or within thirty (30) days thereof) is produced. Section 8(c)(13)(C) as amended. **See Manders v. Alabama Dry Dock and Shipbuilding Corp.**, 23 BRBS 19 (1989); **Gulley v. Ingalls Shipbuilding, Inc.**, 22 BRBS 262 (1989), **aff'd in part, rev'd in part and remanded sub nom. Ingalls Shipbuilding v. Director, OWCP**, 898 F.2d 1088 (5th Cir. 1990), **Rehearing En Banc denied**, 904 F.2d 705 (June 1, 1990).

Regarding Claimant's present hearing loss, on October 6,

1999, Claimant's hearing was tested by a certified audiologist at Mid Coast Hospital. Claimant received a copy of these results through his attorney. (CX 3) Thus, the audiogram meets the requirements of Section 8(c)(13)(C) and is deemed presumptive evidence of the extent of Claimant's hearing loss as of October 6, 1999. The results calculated under the JAMA standard are:

October 6, 1999 (CX 3 at 27)

	Left Ear	Right Ear
500 Hz	40 dB	45 dB
1000 Hz	50	50
2000 Hz	70	70
3000 Hz	95	70
Monaural	58.125%	50.625%
Binaural	51.70%	

The parties have stipulated and this Court verifies that the JAMA interpretation of this audiogram reveals a 51.70 percent binaural hearing loss. (TR 7)

C. Entitlement

Claimant is entitled to compensation for is hearing loss under the 1984 Amendments to the Longshore and Harbor Workers' Compensation Act. Section 10(i) provides that Claimant's time of injury and average weekly wage shall be determined using the date on which the Claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his employment, his hearing loss and his disability. The date of onset for payment of Claimant's benefits is the date the evidence of record demonstrates his current hearing loss. **Howard v. Ingalls Shipbuilding, Inc.**, 25 BRBS 192 (1992).

For purposes of Section 8(c)(13) and his hearing loss, the date of Claimant's injury is the date of manifestation. The record reflects that Claimant received a copy of the doctor's (CX 2) report on or about November 29, 1999 and that he had previously filed a protective claim on or about April 4, 1996. (CX 6) Moreover, Claimant continued working and continues to work at the Employer's shipyard. (CX 8) Thus, the Court finds November 29, 1999 to be the date Claimant learned that his disability was work-related and the date of the manifestation for Section 8 purposes. This Court additionally concludes that Claimant's average weekly wage is $651.18, as stipulated by the parties and corroborated by the record. (TR 7; CX 5) **Fucci, supra**; **Fairley, supra**; **Grace, supra**.

Since Claimant was still working when he filed his claim, he is entitled to a scheduled award under Section 8(c)(13). Claimant's binaural hearing loss entitles him to compensation paid at the rate of 66 2/3 percent of his average weekly wage of $651.18 multiplied by his 51.70 percent binaural hearing loss, commencing on November 29, 1999, the date of manifestation. **Macleod v. Bethlehem Steel Corporation**, 20 BRBS 234, 237 (1988). **See also Fucci, supra.**

III. Medical Benefits

Claimant is entitled to medical benefits under Section 7 of the Act for reasonable, necessary and appropriate expenses related to his loss of hearing. The record establishes that Claimant's hearing tests were administered on various dates when he saw Dr. Haughwout to have his condition evaluated for the purposes of this litigation, the claim having been filed three years earlier. The expenses of these visits for the audiogram (CX 3) and for Dr. Haughwout's evaluation (CX 2) will be paid by the Employer as a necessary litigation expense under Section 28(d). Claimant is also entitled to reasonable, necessary and appropriate future medical benefits for his hearing impairment, including hearing aids, if necessary, subject to the provisions of Section 7 of the Act. Claimant's medical bills total at least $3,065.00 (CX 7) and these are the Employer's responsibility.

IV. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1978); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46, 50 (1989). The Board concluded that inflationary trends in our economy have rendered a fixed six (6) percent rate no longer appropriate to further the purpose of making claimant whole, and held that the fixed six (6) percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills. **Grant v. Portland Stevedoring Co.**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

V. Section 14(e)

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. **Universal Terminal and Stevedoring Corp. v. Parker**, 587 F.2d 608 (3rd Cir. 1978); **Gulley, supra**; **Rucker v. Lawrence Mangum & Sons, Inc.**, 18 BRBS 76 (1986); **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 78 (1985); **Frisco v. Perini Corp.**, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a Notice of Controversion (Form LS-207) is fled with the Deputy Commissioner on the date of the informal conference, whichever

is earlier. **National Steel & Shipbuilding Co. v. U.S. Department of Labor**, 606 F.2d 875 (9th Cir. 1979); **National Steel & Shipbuilding co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1978); **Spencer v. Baker Agricultural Company**, 16 BRBS 205 (1984); **Reynolds v. Marine Stevedoring Corporation**, 11 BRBS 801 (1980).

The Benefits Review Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension or termination is the functional equivalent of a Notice of Controversion." **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 79 (1985); **Rose v. George A. Fuller Company**, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring). **See also Fairley, supra.**

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer's Notice of Controversion (EX 3) is dated February 13, 1996 and Claimant's Form LS-201 (EX 4), dated March 4, 1996, was received by the Employer on or about that date. (EX 1)

IV. Limitation of Liability

Regarding the Section 8(f) issue, the Employer is entitled to such relief if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the Employer and (3) which combined with the subsequent injury to produce a greater degree of permanent disability. **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The 1984 Amendments to the Longshore Act have now made it possible for an employer to seek contribution from the Special Fund for the employee's pre-employment hearing loss to the extent that such loss existed at the time of hiring, retention or re-hiring by the maritime employer. Ordinarily, the obligation of the Special Fund to pay compensation benefits does not arise until after one hundred and four (104) weeks of

permanent disability have elapsed. However, Congress has now mandated that the Fund is responsible for the employee's pre-employment or pre-existing hearing loss even if the Employer's obligation for benefits is less than one hundred and four (104) weeks. **See** Section 8(f)(1); Conference Report, H.R. 98-1027, 98th Cong. P.L. 98-426, pg 8. **See also Strachan Shipping Co. v. Nash**, 51 F.2d 1460 (5th Cir. 1985), **aff'd in pertinent parts on reh. en banc**, 782 F.2d 513 (5th Cir. 1986); **Balzer v. General Dynamics Corp.**, 22 BRBS 447 (1989), **Decision and Order on Motion for Reconsideration En Banc**, 23 BRBS 241 (1990); **McShane v. General Dynamics Corp.**, 22 BRBS 427 (1989); **Risch v. General Dynamics Corp.**, 22 BRBS 251 (1989); **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 90 F.2d 506 (2d Cir. 1990). Under Section 8(f) as amended in1984, where benefits are awarded under Section 8(c)(13), the employer is liable only for the lesser of one hundred and four (104) weeks or the period attributable to the subsequent injury. **Fucci v. General Dynamics Corp.**, 23 BRBS 161, 164 (1990). Moreover, audiograms taken during the course of employment may be considered if thereafter the employee continues to be exposed to injurious levels of shipyard noise and the employer establishes that the continued exposure aggravated the claimant's hearing loss. (**Id.** at 165)

The Employer has submitted the most recent audiograms contained in Claimant's employment physical examination reports. The audiogram was performed on February 6, 1996 (EX 23 at 66) upon Claimant's retention in employment. The audiogram was administered to Claimant by Lisa Klop, M.S., CCC-A. Because Ms. Klop is a certified and licensed audiologist, this audiogram is considered presumptive evidence of Claimant's degree of hearing loss sustained as of that date pursuant to Section 8(c)(13)(C). Thus, the results are presumptive evidence and the obtained values are accepted by this Court as the test is reliable and in the absence of contradictory evidence at the same time or within thirty (30) days of such audiogram.

In the case at bar, the Employer has met this burden and this Court concludes that Claimant's February 6, 1996 employment audiogram is reliable. In so finding, this Court concludes that this audiological evaluation was taken in the usual course of the audiological testing at the Pine Tree Society. (EX 23) Lisa Klop, M.S., CCC-A, a certified expert in the field of audiology, has identified the technical procedures relating to Claimant's hearing test, and she has certified the test

equipment was in compliance with all federal regulations existing at that time. She has indicated that the test machine used for Claimant's audiogram was calibrated to the appropriate standards formulated by the American National Standards Institute (ANSI). With regard to the February 6, 1996 audiogram, Ms. Klop has indicated also the test procedures utilized. Thus, I reiterate my conclusion that that audiogram is reliable and is accepted by this Court.

The 1984 Amendments provide that audiogram results shall be calculated according to the JAMA standard. Section 8(c)(13)(E); **Reggiannini v. General Dynamics Corp.**, 17 BRBS 254 (1985). The JAMA standard uses the values obtained at 500, 1,000, 2,000 and 3,000 hertz. The formula then applied to determine the degree of hearing loss is as follows:

monaural loss = [(average of results at specified levels) - 25 x 1.5]

binaural loss = [(5 x smaller monaural loss) + larger monaural loss divided by 6]

The results of that employment audiogram, calculated under the JAMA standard, are as follows:

February 6, 1996 (EX 23 at 66)

	Left Ear	Right Ear
500 Hz	35 dB	40 dB
1000 Hz	40	45
2000 Hz	75	55
3000 Hz	90	60
Monaural	52.50%	37.50%
Binaural	40%	

Accompanying the audiogram is a report from Ms. Klop, who has calculated that under JAMA guidelines this audiogram yields

an employment binaural hearing loss of 40 percent in 1996 (EX 23 at 67) upon Claimant's hiring/rehire retention in employment. (**Id.**)

In view of the fact that Claimant commenced employment at the Employer's shipyard in 1974, left several times to accept employment elsewhere in various jobs in an environment with some exposure to noise, returned several times and still is employed at the Employer's shipyard, this Court concludes that Claimant's February 6, 1996 (EX 23 at 66) audiogram is most representative of Claimant's employment hearing impairment, and that such pre-employment loss is 40 percent, binaural.

Although the Director was given the opportunity by this Court on May 12, 2000 (ALJ EX 1) to file brief pertaining to the applicability of Section 8(f), the Director filed no such substantive comments. As the Employer timely filed a Section 8(f) petition, it is entitled to Section 8(f) relief and there is no bar to this entitlement as the Director was on notice of this Section 8(f) request as of March 2, 2000 (EX 11) and again was notified on May 8, 2000 (ALJ EX 12) and again on May 31, 2000. (ALJ EX 13)

This Court, therefore, finds and concludes that the Employer has established that Claimant (1) has worked continuously for the Employer since 1974, except for those periods during which he was on layoff status or left the shipyard for personal reasons (CX 6), (2) suffered a forty (40%) percent pre-employment hearing loss which was manifest to the Employer at the time of retention after February 6, 1996, (3) now suffers from a 51.70 percent permanent partial disability (hearing loss) that resulted from a combination of his pre-employment permanent partial disability (**i.e.**, his hearing loss as of February 6, 1996) and his November 29, 1999 injury. The Employer, therefore, is entitled to a limitation of liability under Section 8(f) and the Special Fund shall be responsible for Claimant's forty (40%) percent employment hearing loss, as found above.

Claimant's condition was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain an aggravation of his pre-employment hearing loss. The Employer, in hiring, rehiring and then retaining Claimant, has effectuated the

purpose of Section 8(f) which was enacted to encourage employers to hire and retain handicapped workers. **See** H.R. Rep. No. 1441, 92d Cong. 2d Sess. 8. **Reprinted** in 1972 U.S. Code Cong. & Admin. News 4698, 4705-06; S. Rep. No. 1125, 92d Congress, 2d Sess. 7 (1972). **See also Director, OWCP v. Campbell Industries, Inc.**, 678 F.2d 836, 839, 14 BRBS 974, 976 (9th Cir. 1982), **cert. denied** 459 U.S. 1104 (1983); **C & P Telephone Co. v. Director, OWCP**, 564 F.2d 503, 512, 6 BRBS 399, 412 (D.C. Cir. 1977); **Harris v. Newport News Shipbuilding and Dry Dock Co.**, 23 BRBS 114, 116 (1989). **See also White v. Bath Iron Works Corp.**, 812 F.2d 33, 19 BRBS 70 (CRT)(1st Cir. 1987); **Risch v. General Dynamics Corporation**, 22 BRBS 251 (1989).

Claimant's audiograms at the Employer's First Aid Clinic begin on August 26, 1974 and the most recent audiogram is dated October 13, 1998. (CX 1) Thus, the Employer has had actual notice of Claimant's hearing loss for those years.

This Court, having found Section 8(f) applicable, must now consider the effects of the 1984 Amendments on the Employer's liability. Since this claim was filed after the effective date of the 1984 Amendments, the Employer is liable for the lesser of one hundred and four (104) weeks or the applicable prescribed period of weeks under the schedule for that portion of Claimant's hearing loss attributable to his shipyard employment with this Employer after he was retained in employment on February 6, 1996. **See** Section 8(f)(1) and 8(c)(13); **Risch, supra**.

In view of the foregoing, the Employer is responsible to the Claimant for his 51.70 percent hearing loss to the extent of 11.70 percent (**i.e.**, 51.70 - 40.00 =) and shall pay Claimant, Ernest H. Giles, Jr., commencing on November 29, 1999, appropriate compensation for his 11.70 percent work-related hearing loss, as the Employer is responsible only for the increase of Claimant's hearing loss resulting from his shipyard work from February 6, 1996, based on an average weekly wage of $651.18, as found above. The Special Fund shall pay to Claimant appropriate compensation for his 40 percent pre-employment hearing loss, that portion for which the Special Fund is responsible pursuant to the 1984 Amendments to the Act, also based on his average weekly wag of $651.18. **See** Section 8(F)(D).

VII. Responsible Employer

The Employer and its Carrier ("Respondents") are responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. Sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.** 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to the injurious stimuli, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfied **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

Appropriate benefits for the hearing loss are payable by the employer during the last maritime employment in which the claimant was exposed to the injurious stimuli, **i.e.**, loud and excessive noise, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment.

Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). The "awareness" component of the **Cardillo** standard is in essence identical to the "awareness" requirement in Sections 12 and 13 of the Act.

The Board has consistently held that the time of awareness for purposes of the last employer rule must logically be the same as awareness for purposes of the provisions of Sections 12 and 13 of the Act. **See, e.g., Grace v. Bath Iron Works Corp.**, 21 BRBS 244, 247 (1988).

As indicated above, in hearing loss cases, the responsible employer is the employer during the last employment in which claimant was exposed to injurious stimuli prior to the date claimant receives an audiogram showing a hearing loss, and has knowledge of the causal connection between his work and his hearing loss. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205, 208 (1985).

Courts and the Board have consistently followed the **Cardillo** standard because apportionment of liability between several maritime employers is not permitted by the Act. **See, e.g., General Ship Service v. Director, OWCP (Barnes)**, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991); **Ricker v. Bath Iron Works Corp.**, 24 BRBS 201 (1991) (the last maritime employer is still responsible for benefits even if the firm is out of business and there may be no insurance coverage under the Act); **Brown v. Bath Iron Works Corp.** 22 BRBS 384 (1989), **aff'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP**, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), **aff'd**, 113 S.Ct. 692 (1993).

The so-called **Cardillo** rule holds the claimant's last maritime employer liable for all of the compensation due the claimant, even though prior employers of the claimant may have contributed to the claimant's disability. This rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since "all employers will be the last employer a proportionate share of the time." **General Ship Service, supra**, 938 F.2d at 962, 25 BRBS at 25. The purpose of the last employer rule is to avoid the complexities of assigning joint liability and it is apparent that Congress intended that the last employer be completely liable because of the difficulties and delays which would inhere in the administration of the Act if attempts were made to

apportion liability among several responsible employers. **Todd Shipyards v. Black**, 717 F.2d 1280, 1285, 16 BRBS 13, 16 (CRT) (9th Cir. 1983), **cert. denied**, 46 U.S. 937 (1984). Moreover, the last employer rule is not a valid defense where a subsequent employer not covered by the Act also contributed to the occupational disease. **Black, supra**, 16 BRBS 15 17 (CRT).

The Board approved the holding of the judge who found as more reliable the 1988 medical evidence because it included an audiogram and the identity of the test administer, a certified audiologist, who opined that the 1988 test was more complete since it reflected all of claimant's hearing impairment. **Dubar v. Bath Iron Works Corp.**, 25 BRBS 5 (1991); **Labbe v. Bath Iron Works Corp.**, 24 BRBS 159 (1991); **Brown v. Bath Iron Works Corp.**, 24 BRBS 89 (1990), **aff'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP (Brown)**, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), **aff'd**, 113 S.Ct. 692 (1993).

The Employer has been a self-insurer under the Act since September 1, 1988 and the Employer has accepted liability herein as the Responsible Employer. (TR 8)

VIII. Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on January 23, 2001 (CX 9) concerning services rendered and costs incurred in representing Claimant between March 3, 2000 and January 12, 2001. Attorney James W. Case seeks a fee of $4,148.52 (including expenses) based on 18.30 hours of attorney time at $195.00 per hour and 6.90 hours of paralegal time at $65.00 per hour.

The Employer has objected to the requested attorney's fee as excessive in view of the benefits obtained and the hourly rate charged. (EX 27)

In accordance with established practice, I will consider only those services rendered and costs incurred after March 2, 2000, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

The Employer objected to the hourly rate and proposed an hourly rate of $185.00 for Attorney Case. The hourly rate suggested by the Employer is certainly not realistic at this time, especially in contingent litigation where the attorney's fee is dependent upon successful prosecution. Such a fee if adopted in these claims, would quickly diminish the quality of legal representation.

This claim was successfully prosecuted with a most reasonable number of hours and, in fact, it was vigorously defended by the Employer right up to the hearing before me. Thus, the hours itemized by Attorney Case are reasonable and appropriate and the hours requested are approved. Moreover, the hourly rate sought by Attorney Case is most reasonable and is approved, especially for Attorney Case, a member of the bar since 1974 and who is always prepared and who is an effective advocate for his clients. In fact, the hourly rate of $195.00 has been in effect for Attorney Case and his senior partner, Attorney Higbee, throughout most of 2000. Furthermore, Attorney Case is awarded one additional hour for the successful defense of his fee petition. (CX 10)

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $4,343.52 (including expenses of $131.52) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall:

a) Pay Claimant appropriate compensation, commencing on November 29, 1999, for his 11.70 percent work-related binaural hearing loss, based upon his average weekly wage of $651.18, such compensation to be computed pursuant to Section 8(c)(13)(B).

b) Furnish Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related hearing loss referenced herein may require, including hearing aids if necessary, even after the expiration of the time period specified in Order provisions 1(a), as well as payment of the Pine Tree Society's medical bill in evidence as CX 7, subject to the provisions of Section 7 of the Act.

2. The Special Fund shall pay Claimant compensation benefits, based on his average weekly wage of $651.18, for his forty (40%) percent pre-employment hearing loss pursuant to Section 8(f)(1).

3. The Employer and the Special Fund shall pay Claimant interest on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall pay to Claimant's attorney, James W. Case, a reasonable legal fee of $4,343.52 (including expenses) for representing Claimant herein before the Office of Administrative Law Judges between March 3, 2000 and January 12, 2001.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl